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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

To: The Commission

REPLY COMMENTS
OF THE
AMERICAN PUBLIC POWER ASSOCIATION

By: American Public Power Association
2301 M Street, NW
Washington, DC 20037
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February 11, 1993

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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket 92-266

REPLY COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF A BROAD INTERPRETATION
OF GEOGRAPHICALLY UNIFORM RATES

The American Public Power Association (APPA), the national service organization representing more than 2,000 locally owned electric utility systems, included more than 40 which also own and operate cable television systems, hereby files its reply comments in the above captioned proceeding in response to the Commission's Notice of Proposed Rule Making released December 24, 1992 (NPRM), stating as follows:

I. INTRODUCTION

APPA's main interest in this proceeding is to promote fair, head-to-head competition among cable operators. As stated in our initial comments, due to the enormous market power wielded by incumbent cable operators, this can only be accomplished by requiring cable operators to establish uniform pricing structures across the broadest possible geographic area of service.

APPA's position was generally supported in the initial comments submitted by the Glasgow (KY) Electric Plant Board; the City of

Manitowoc, WI; and the City of Bandon, OR. Other comments, such as Nationwide Communications Inc. and Liberty Cable Co. Inc. (Liberty), concurred that the definition of a geographic area should certainly be larger than a franchise area. Finally, all of the above commenters, along with the Wireless Cable Association (WCA), expressed the need for strong implementation of the new uniform geographic rates provision to prevent incumbent cable operators from thwarting long-term competition by temporarily undercutting new cable system entrants.

Not surprisingly, most of the cable operators called for an artificially narrow view of the term "geographic area", with the most vociferous comments coming from some of the most horizontally concentrated systems.

II. LIMITING GEOGRAPHICALLY UNIFORM REQUIREMENT TO A FRANCHISE AREA IGNORES THE THRUST OF THE 1992 CABLE ACT

Several cable system operators argued in their initial comments that the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) indicates that Congress intended the uniform rate structure requirement to apply only to a franchise area. However, these commenters seized upon only three sentences out of two years of Congressional hearings and debates to support this position.

Three short sentences out of thousands of pages of testimony, reports, and debate cannot be construed to express the intent of Congress on this important point. Through letters, telephone calls, personal visits, and testimony, Congress heard numerous examples of how cable system operators have used their market power to drastically undercut fledgling competitors' rates in an effort to thwart competition. In the 1992 Cable Act and the Senate, House, and Conference Committee reports accompanying the legislation, Congress expressed its concern about how incumbent cable operators were flexing their market muscle to erect barriers to competition in cable markets. Congress acted to remove these barriers by providing for fair access to programming and cable home wiring, generally prohibiting exclusive franchises, and requiring uniform rate structures throughout the geographic areas served by cable operators. To seize upon these three selective sentences as the basis for limiting uniform rate requirements to franchise areas flies in the face of this clearly expressed Congressional intent to promote competition. The cable systems advocating this position are grasping at straws.

III. NO BASIS GIVEN FOR LINKING SECTION 623 (d) TO ANTI-REDLINING PROVISIONS OF 1934 ACT

Nashaba Communications (Nashaba), Falcon Cable Group (Falcon), Time Warner Entertainment Co. (Time Warner), and Tele-Communications Inc. (TCI) -- all of which are cable system operators serving multiple franchises -- contend that Section 623 (d) should be construed as complimentary to Section 621 (a) (3) of the Communications Act of 1934 (47 U.S.C. 541 (a)(3)) which requires franchising authorities to assure that access to cable service is not denied to any group of potential subscribers because of their income (the so-called "anti-redlining" provision). Read in this manner, they contend, the real purpose of Section 623 (d) is to prohibit rate-regulated cable operators from "disadvantaging" unattractive neighborhoods by charging their residents higher prices than their more favored neighbors. See Nashaba Comments at 116.

The multiple-franchise cable operators can't even find one sentence in the legislative history of the 1992 Cable Act to support this interpretation. They provide no basis for reaching this conclusion. Absent such supporting documentation, their conclusion must be dismissed. As set forth in APPA's initial comments, the clear intent of Congress in Section 623 (d) was to blunt the ability of incumbent cable operators from drastically undercutting the rates of competitors in those limited geographic areas where they compete head-to-head.

IV. ARGUMENT THAT UNIFORM GEOGRAPHIC RATE REQUIREMENT WOULD FINANCIALLY JEOPARDIZE CABLE OPERATORS HAS NO BASIS IN REAL WORLD

Time Warner, Falcon, Nashaba, Jones Intercable, and Continental Cablevision (Continental) paint a scenario whereby a requirement of geographic price uniformity can be "economically crippling" to a cable operator that is partially overbuilt by another cable operator. Falcon describes the situation as follows:

> If forced to have a geographically uniform price, the operator must choose between maintaining its price and losing significant numbers of its customers in the overbuilt area, or lowering its price system-wide, and losing significant total revenues. If the operator elects the latter course, it may be pricing below cost system-wide, an action which, if continued, will threaten the system's financial vitality. Falcon Comments at 73 - 74.

These multiple-franchise cable operators are describing the current obstacles to competition as seen through the looking-glass. When a new multichannel video distributor enters a market already served by a multiple franchise cable operator, the new entrant often faces the same financial problems described by Falcon, *et. al.* The typical reaction of the incumbent operator is to drastically undercut its competitor's rates in those service areas where they compete head-to-head. The new entrant must then either lower its price, often below cost, to meet the artificially low rates of its established competitor and lose significant revenues, or fail to establish significant market penetration. Either option poses potentially fatal financial jeopardy.

The established multiple franchise cable systems, as represented by Falcon, Time Warner, Continental, Jones Intercable, and Nashaba, have never expressed any concerns about the present market conditions. But if the Commission should turn the tables by requiring uniform rates across broad geographic areas, these same systems forecast all sorts of dire economic results. Jones Intercable goes so far as to describe the scenario as "classic greenmail."

It should also be noted that this argument wasn't advanced by any small operators serving only one, two, or three franchises. Surely the irony cannot be lost upon the Commission of these huge companies with enormous market power cowering before the threat of honest competition with new, often single-franchise operators.

A. Request To Waive Uniform Rate Requirements To Allow Multiple Franchise Operators To Meet Competitor's Prices In Limited Geographic Areas Comes Too Late

Time Warner and Nashaba contend that the Commission should somehow waive the uniform rate requirement to allow a price difference so cable operators facing competition can meet the competitor's price in the limited area where they compete head-to-head. Both commenters cited sections of the Robinson-Patman Act which providing a "meeting competition" defense against price discrimination as indicative of Congressional intent that no one should be punished for meeting, but not beating, a competitor's price.

But Section 623 (d) does not provide for such discretion. It does not say cable operators shall maintain uniform rate structures across the geographic areas they serve -- "if...", "but...", or "when..." Section 623 (d) is beautiful in its simplicity and directness -- there shall be uniform rates across all geographic areas served by a cable operator. It does not give the FCC authority to waive the requirement under any circumstances.

While Time Warner and Nashaba cite the Robinson-Patman Act, it is interesting to note that Congress did not expressly extend this statute to provide a "meeting competition" defense against non-uniform cable system rates. If Congress had been concerned about the dire economic consequences multiple franchise cable operators predict from uniform rate requirements, it would have extended this "meeting competition" defense in Section 623 (d).

Again, the position of Time Warner and Nashaba drips with irony. Congress didn't enact Section 624 (d) because cable operators facing head-to-head competition <u>met</u> their competitor's rates. Instead, Congress acted because of a clear pattern of horizontally integrated cable companies operators using their substantial market clout to severely undercut competitor's rates in an attempt to thwart competition. If such horizontally integrated systems had competed <u>fairly</u>, they wouldn't have had Section 624 (d) thrust upon them.

V. RULE REQUIRING UNIFORM RATES THROUGH CONTIGUOUS AREAS SERVED BY A CABLE SYSTEM SHOULD NOT BE LIMITED TO A SINGLE HEADEND

In Para. 115 of the NPRM, the Commission suggests that the definition of a geographic area might encompass "the contiguous area served by a system." APPA still contends that, while such a definition would be better limiting it to a franchise area, an even broader definition is needed to curb the enormous market power of horizontally integrated cable systems, as described above.

However, TCI, Continental, and Jones Intercable each sought to limit the contiguous area definition in Para. 115 of the NPRM to only that contiguous area served by a single headend. As APPA noted in its initial comments, there are many areas in the country where a single cable company serves contiguous areas from more than one headend. If the geographic uniformity rule were limited to the contiguous areas served by a single headend, there would still be disparity of rates among customers of a single cable company in a relatively small geographic area. Therefore the Commission should not limit its rule to the area served by a single headend.

APPA concurs with Liberty Cable Co. Inc. (Liberty) that the rule should apply to affiliated companies, with the Commission applying its broadcast attribution rules to determine whether one or more companies are affiliated. See Liberty Comments at i and 10. Without such a provision, cable operators could seek to evade the rule by incorporating subsidiaries to serve individual franchises.

VI. CONCLUSION

Section 624 (d) is simple and direct in requiring cable operators to establish uniform rate structures throughout the geographic area served by their systems. It applies to all operators in all instances. The Commission has no discretion to provide exceptions or limitations.

Rather, as the Commissioners set forth in the NPRM, the Commission's only discretion is in determining what Congress intended by the term geographic area.

In their initial comments, horizontally integrated cable companies went to great lengths and took great leaps of logic to concoct scenarios whereby they might escape from Congress' directive that they implement geographically uniform rates. Congress shed no crocodile tears for these big firms, and neither does APPA. Rather, Congress acted to reverse a pattern of unfair, anticompetitive acts by horizontally and vertically integrated cable operators. If implemented as conceived, the 1992 Cable Act will succeed in dragging these operators, kicking and screaming, into a competitive environment. Now it is up to the FCC to adopt rules to implement this landmark legislation. To achieve Congress' desire for fair competition among multichannel video distributors, the FCC must require cable operators to establish uniform rates across the broadest possible geographic area.

WHEREFORE, THE PREMISES CONSIDERED, the American Public Power Association respectfully requests the Commission to take actions consistent with the views expressed herein.

Respectfully submitted,

American Public Power Association

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